SUPREME COURT OF THE UNITED STATES.

No. 44.

THE HUGULEY MANUFACTURING CO. ET AL.

v.

THE GALETON COTTON MILLS ET AL.

BRIEF FOR APPELLEES ON MOTION TO DISMISS.

LOUIS D. BRANDEIS,
WILLIAM H. DUNBAR,
Counsel for Appellees.

Supreme Court of the United States.

THE HUGULEY MANUFACTURING CO. ET AL.

v.

THE GALETON COTTON MILLS ET AL.

BRIEF FOR APPELLEES ON MOTION TO DISMISS.

STATEMENT OF FACTS.

The transcript of the record in the present case is so defective as to make it impossible to present a statement of facts drawn exclusively from the record of the case. The following statement, based upon such material as the transcript affords, is derived largely from the opinion rendered in the Circuit Court of Appeals. (Record, p. 105.)

The Alabama and Georgia Manufacturing Company, a corporation organized under the laws of Georgia (Record, p. 14, statement in petition) on January 1, 1884, executed a mortgage deed of trust to J. J. Robinson and two others to secure $65,000 of bonds. The Huguley Manufacturing Company, also a corporation organized under the laws of Georgia (Record, p. 14) became by purchase the owner of the equity of redemption in this property. (Record, p. 105.) On January 25, 1891, the trustee Robinson filed his bill of complaint against the Alabama and Georgia Manufacturing Company, The Huguley Manufacturing Com-

pany, and William T. Huguley, one of his co-trustees whose interest was adverse to the bondholders, to foreclose the deed of trust. The third trustee was dead. (Record, pp. 55 and 105.)

On this bill a decree of foreclosure was entered and the property sold to persons representing the bondholders. These purchasers organized the Galeton Cotton Mills corporation, one of the appellees. This corporation entered into possession of the property. On appeal to the Circuit Court of Appeals for the Fifth Circuit the decree under which the sale was had was reversed, and a petition of the Huguley Manufacturing Co. for restitution of the property was granted by the Circuit Court on condition that it pay into court $10,000 which had been paid by the purchasers at the sale. This condition was not complied with. The Circuit Court then ordered a new sale of the property. (Record, pp. 55 *et seq.* and 105.) From the decrees ordering a new sale and granting restitution only on condition of the payment of $10,000 the defendants appealed to the Circuit Court of Appeals, which affirmed the action of the Circuit Court. (Record, p. 6.)

Thereupon the property was sold and purchased by one L. Lanier in behalf of the bondholders. (Record, p. 19.) This sale was confirmed on June 25, 1896. (Record, p. 24.)

The defendants having filed a petition for an account of rents and profits from the time of the first sale (this petition is not printed in the transcript) and an amendment thereto (Record, p. 14) a reference was made to a special master who on November 2, 1897, filed his report (Record, p. 25), in which he found the Galeton Cotton Mills liable for rents and profits amounting to $39,713.51. Both parties

filed exceptions to the master's report. Those of the present appellants (Record, p. 40) were directed chiefly to findings of fact. On February 23, 1898, the exceptions of the appellants were overruled, and the exceptions of the appellees were sustained to the extent of reducing the master's finding to $35,857.54 (Record, p. 46), and a decree was accordingly entered on February 28, 1898. (Record, p. 53.)

On April 11, 1898, upon a motion of the appellees (not included in the transcript of the record) the Circuit Court entered a decree directing that the rents and profits should be applied in reduction of the mortgage debt. (Record, p. 55.)

On June 4, 1898, the Circuit Court entered a decree fixing the amount of the mortgage debt and the costs, and directing the manner of applying thereto the rents and profits, and the amount of cash already received, and reserving all questions of costs and expenses not therein disposed of. (Record, p. 64.)

On September 22, 1898, the purchaser at the second sale petitioned for a final conveyance to him (Record, p. 67), and on October 15, 1898, after a hearing, a decree was entered directing the completion of the sale by cash payment and a conveyance. (Record, p. 72.) A motion was made to set aside this decree (Record, p. 75), but was overruled on November 12, 1898 (Record, p. 77), and thereupon an appeal was taken to the Circuit Court of Appeals. (Record, p. 78.)

On this appeal fifty-six errors were assigned. (Record, p. 79.) The appeal was heard and the decree of the Circuit Court was, on May 16, 1899, affirmed (Record, p. 98), a petition for a rehearing (Record, p. 99) was filed,

and on June 1, 1899, denied (Record, p. 102), and on May 12, 1900, a petition for an appeal to this court was presented to Judge Pardee, and by him allowed, in order to preserve any possible rights of the petitioners, although he expressly stated that he seriously doubted the right of appeal. (Record, p. 103.)

The appellants are the original defendants in the bill to foreclose, and the appellees named in the appeal bond (Record, p. 95) appear to be the original plaintiff (the trustee under the mortgage) and the Galeton Cotton Mills, the purchaser at the first sale; L. Lanier, who purchased at the second sale, is not named in the bond, although he is named as an appellee in the citation (Record, p. 109.)

The appellees now move to dismiss the appeal:

1. Because the transcript of the record is so defective that the Court cannot dispose of the case on the merits.

2. For want of jurisdiction of the appeal.

Argument.

I.

The appeal should be dismissed because the transcript of the record is so defective that the Court cannot dispose of the case on the merits.

1. The record is substantially defective.

It appears incidentally from the transcript of the record that this case is a proceeding in equity begun in 1891 by one of the appellees, J. J. Robinson, against the appellants for the foreclosure of a mortgage deed of trust; that the

property was sold by decree of court and purchased by the other appellee, the Galeton Cotton Mills ; that after appeal to the Circuit Court of Appeals the decree for a sale was set aside, and that thereafter a second sale was ordered, the decree for which was affirmed on appeal ; that at some time the Galeton Cotton Mills became a party to the suit ; that at some time a petition was filed by the appellants for an account of rents and profits during the period of possession under the first sale ; and that the final disposition of that petition is the real subject of the present appeal.

The transcript of the record filed in this court does not contain :

(1) the bill of complaint, answer, or any pleadings between the original parties ;

(2) the decree under which the property was originally sold ;

(3) the report of and confirmation of this sale in pursuance of which the property was held by the purchasers during the period for which an accounting is asked ;

(4) the decree of the Circuit Court of Appeals reversing this decree for sale;

(5) the decree for a second sale from which the second appeal to the Circuit Court of Appeals was taken;

(6) the appearance and admission of the Galeton Cotton Mills, one of the appellees, as a party to the suit;

(7) the original petition for an account of rents and profits;

(8) any paper filed prior to receipt of the mandate from the Circuit Court of Appeals on the second appeal.

Although the litigation began in January, 1891, no papers filed and no proceedings had prior to the mandate

received from the Circuit Court of Appeals on the second appeal on March 10, 1896, are included in the transcript. No agreement as to the making up or printing of the transcript in this court appears. There was such an agreement as to the printing of the transcript of record on the third appeal to the Circuit Court of Appeals (Record, p. 1), and a further agreement (Record, p. 5), that the record should not include any part transmitted on the two former appeals, but that either party might refer to such former printed records. These agreements cannot affect the transcript to be transmitted to this court. The fact that parts of the record were already on the files of the Circuit Court of Appeals and had previously been printed might warrant omitting them from the record made up for the third appeal, and no practical inconvenience would result, as the court would be provided with and could consider the omitted parts. In this court, however, there is nothing to supply the omission, and the case can be heard and determined only on the matter which appears in the transcript. These defects do not result from any agreement between the parties as to the transcript of record for this court, for no such agreement has at any time been made.

The rules of this court expressly provide that the record must be complete, containing in itself and not by reference all papers and proceedings necessary to the hearing in this court. Rule 8, clause 3.

2. The defects are such that this court cannot dispose of the case on the merits.

(*a*) This court will of its own motion dismiss a case

in which the record fails to show jurisdiction in the court below.

Mansfield, C. & L. M. R'y Co. v. *Swan*, 111 U.S. 379.

The lack of jurisdiction cannot be cured by consent of the parties or failure of the court below to take objection to the jurisdiction. It is necessary, therefore, to enable this court properly to hear and dispose of a case brought to it by appeal, that the record should include whatever papers are relied upon to show the jurisdiction of the court below.

The printed transcript in the present case contains no paper showing any jurisdiction. The original bill of complaint which, it may be conjectured, contained allegations showing a diversity of citizenship or some other ground of jurisdiction in the Circuit Court is not included in the transcript. It does not appear, therefore, from the record now before this court that there was any jurisdiction in the Circuit Court. If the necessity of showing such jurisdiction can be obviated by omitting the bill of complaint from the transcript, then by agreement so to do the parties can deprive this court of the power to determine the existence of jurisdiction.

(*b*) This court has always treated as incomplete a record in which the pleadings were not included, and has refused to hear a case on such a record.

In *Redfield* v. *Parks*, 130 U.S. 623, the transcript contained a bill of exceptions which so far as appears set forth all the material facts; but this court refused to hear the case, the pleadings being omitted, saying: "The complaint and answers are necessary to the hearing in this

court, and unless a record containing them is filed here the case cannot be heard." P. 625.

The same rule had previously been laid down where the transcript contained the agreed statement of facts on which the case had been heard in the court below and the judgment of that court, but omitted the pleadings.

Keene v. *Whittaker*, 13 Peters, 459.
Curtis v. *Petitpain*, 18 How. 109.

In the present case the necessity of having the pleadings is greatly intensified. The only means of ascertaining from the transcript the nature of the controversy is examining the opinions of the courts below, which contain succinct statements of the nature of the cause and the course of proceedings. Even the original petition by the appellants, the foundation of their whole claim as to rents and profits, has been omitted. There is absolutely nothing to take the place of the pleadings even if a more or less inadequate substitute could be allowed.

The rules of this court do not prescribe and it would perhaps be impossible to prescribe by rule what a record on appeal must include, but rule 52 in admiralty "may serve as an appropriate guide in cases at law or in equity" (*Railway Co.* v. *Stewart*, 95 U.S. 279, 285), and it is there provided that the transcript of record shall include the pleadings.

3. The case should be dismissed.

"It is clearly the duty of the party who takes an appeal to see to it that the record is properly presented here." *Railway Co.* v. *Stewart*, 95 U.S. 279, 284.

It is certainly not the duty of the appellees to go to expense in applying for a *certiorari* in order to have the record complete enough for the case to be heard. In case of such deficiency in the record the court can dismiss the appeal.

Redfield v. *Parks*, 130 U.S. 623.

This course was not adopted in the case just cited because the court deemed that the circumstances were such as to make a less vigorous course proper. In the present case there has been no such delay as was there deemed material. The transcript of record was filed in this court on June 25, 1900. It was not printed for about a year, and this motion is made at the first opportunity after the transcript was printed. This court has taken judicial notice of the fact that counsel rarely see the transcript until it is printed.

Bein v. *Heath*, 142 U.S. 704.

II.

The appeal should be dismissed for want of jurisdiction.

1. The record fails to show jurisdiction of the appeal.

It is the settled law of this court that jurisdiction must be made affirmatively to appear, and if the record fails to show jurisdiction the appeal will be dismissed.

Hunt v. *Blackburn*, 127 U.S. 774.
Ansbro v. *United States*, 159 U.S. 695.

The printed transcript in the present case fails to show any ground of jurisdiction in the court below. Assuming

that the Circuit Court had jurisdiction on some ground, it does not appear on what ground, and therefore it does not appear whether an appeal from the Circuit Court lay direct to this court or to the Circuit Court of Appeals. Assuming that an appeal lay to the Circuit Court of Appeals, it does not appear whether or not the case is one in which by statute the decree of that court would be final, and therefore it does not appear whether this appeal lies to this court.

2. The decision of the Circuit Court of Appeals was final.

(*a*) The jurisdiction of the Circuit Court must have been dependent entirely on diversity of citizenship.

The ground of original jurisdiction in the Circuit Court for the purpose of determining the finality of a decision by the Circuit Court of Appeals depends upon the ground of jurisdiction shown by the plaintiff when he first brings his suit.

> *Colorado Central Mining Co.* v. *Turck*, 150 U.S. 138.
>
> *Press Publishing Co.* v. *Monroe*, 164 U.S. 105.
>
> *Ex Parte Jones*, 164 U.S. 691.
>
> *American Sugar Refining Co.* v. *New Orleans*, 181 U.S. 277.

The original bill of complaint is not in the transcript of the record, so that it is impossible to refer to it to determine the ground of invoking the jurisdiction of the Circuit Court, but the other parts of the record make the conclusion practically certain.

The Circuit Court, under the Act of August 13, 1888, c. 866 (25 St. 433), has original jurisdiction of civil cases: (1) arising under the constitution, laws, and treaties of the United States; (2) in which the United States are plaintiffs; (3) between citizens of different States; (4) between citizens of the same State claiming lands under grants from different States; (5) between citizens of a State and foreign states, citizens, and subjects.

It sufficiently appears from the record that the United States was not a party plaintiff; that no lands were claimed under grants from different States; and that no foreign state, citizen, or subject was a party. Jurisdiction must have been founded either on diversity of citizenship or some claim made under the constitution, laws, or treaties of the United States.

The record contains (Record, p. 79) a very elaborate assignment of errors filed by the present appellants in the Circuit Court of Appeals, which may fairly be deemed to include all issues in the case. The following analysis of these alleged errors shows that none of them is founded upon any question arising under the constitution, laws, or treaties of the United States that can have been raised by the original bill of complaint. All of the alleged errors were in the action of the court in respect to matters arising subsequent to the bringing of the suit.

Errors numbered 1 and 2 were directed to the confirmation of the second sale before the special master, to whom the accounting for rents and profits was referred, had reported.

Errors numbered 3, 4, and 5 were directed to the confirmation of the special master's report, on the ground that he had not properly performed his duties.

Errors 6 numbered to 12, both inclusive, 14 and 36, were directed to the rule or measure of liability for rents and profits adopted by the special master and by the court.

Errors numbered 13, 15, 16, and 17 were directed to rulings on evidence before the special master.

Errors numbered 18 to 30, both inclusive, 39 and 40 were directed to the rule adopted by the special master and by the court as to the application of the rents and profits.

Errors numbered 31, 32, and 33 were directed to the method of estimating the deficiency after application of rents and profits.

Errors numbered 34 and 35 related to a petition of one of the appellants concerning its claim to certain personal property converted after the first sale.

Errors numbered 37 and 38 were directed to the action of the court in modifying its decision in reference to the rents and profits, and allowing payment of counsel fees.

Errors numbered 41 to 47, both inclusive, were directed to the action of the court in deducting the cash paid by the purchaser at the first sale from the sum to be paid to complete the second sale.

Error numbered 48 was directed to the action of the court in fixing the amount to be paid to complete the sale.

Error numbered 49 was directed to the decision of the court denying the appellant Huguley Manufacturing Co. a lien on property for anything it might recover in this suit.

Errors numbered 50 to 55, both inclusive, were directed to the action of the court in allowing the second sale to be completed after a delay of two and a half years.

Error numbered 56 was founded on the allegation that the action of the Circuit Court was not in conformity with the mandate from the Circuit Court of Appeals on a prior appeal.

It is obvious that none of these assignments of error concern any issue which would indicate that the plaintiff's case as originally presented by him arose under the constitution, laws, or treaties of the United States. While it cannot be said that this precludes the possibility of such an original ground of jurisdiction appearing, it affords a fair foundation for such an inference.

(*b*) If jurisdiction was dependent wholly on diversity of citizenship the decision of the Circuit Court of Appeals was final.

The Act of March 3, 1891, c. 517 (26 St. 826), provides in section 6 that the Circuit Court of Appeals shall have appellate jurisdiction to review judgments and decrees of the Circuit Courts in all cases in which a direct appeal is not by section 5 given to this court, and that the judgments and decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely on diversity of citizenship.

In any case, therefore, in which original jurisdiction is taken by the Circuit Court on the ground wholly of diversity of citizenship — by which is meant, as above set forth, that no other ground of jurisdiction is shown by the plaintiff's original presentation of his case in the Circuit Court — the decision of the Circuit Court of Appeals, if an appeal to that court is taken, is final. If in the course of the proceedings any question arises which brings the case within the category of section 5 of the Act, providing for a direct appeal to this court, the party aggrieved by the

final judgment or decree of the Circuit Court may appeal direct to this court (*Loeb* v. *Columbia Township Trustees*, 179 U.S. 472,) but he may also none the less as an alternative appeal to the Circuit Court of Appeals, and if he does so that court has jurisdiction to dispose of the appeal ;

American Sugar Refining Co. v. *New Orleans*, 181 U.S. 277;

and its decision thereon is final, except as to questions certified by it and on *certiorari* from this court.

Colorado Central Mining Co. v. *Turck*, 150 U.S. 138.

Press Publishing Co. v. *Monroe*, 164 U.S. 105.

Ex Parte Jones, 164 U.S. 691.

American Sugar Refining Co. v. *New Orleans*, 181 U.S. 277.

This is in accordance with the general intention of the Act, to distribute the appellate jurisdiction and to permit an appeal to only one court in any case.

Robinson v. *Caldwell*, 165 U.S. 359.

(*c*) The appellants have failed to show any ground for an appeal to this court.

The only cases in which an aggrieved party can appeal to the Circuit Court of Appeals, and from that court to this court, are cases in which there is some ground of appellate jurisdiction other than the grounds which are enumerated in section 5 of the Act of March 3, 1891, and some ground of original jurisdiction in the Circuit Court other than diversity of citizenship. The appellants have failed by the record which they have brought to this court

to show any ground of jurisdiction in the Circuit Court or of appeal to this court. In the assignments of error already referred to (Record, p. 79) there is nothing that can by any possibility be supposed to show the existence of a federal question in the controversy. The alleged errors numbered 28 and 29 do indeed speak of the impairment of rules of property and the impairment of the obligation of a contract, but only with reference to the action of the Circuit Court. They raise no question which would either give original jurisdiction to the Circuit Court or direct appellate jurisdiction to this court.

To avail of any question as a ground of appeal it must be made to appear that it actually was a substantial matter of controversy. If the appellant desired, after his unsuccessful appeal to the Circuit Court of Appeals, to take an appeal to this court on the ground that the case was one in which jurisdiction did not depend entirely on diversity of citizenship, it was his duty to make the existence of the ground of his appeal apparent, and if the record fails to show that there was such a ground of appeal the decision of the Circuit Court of Appeals is final, and the appeal should be dismissed.

Borgmeyer v. *Idler*, 159 U.S. 408.
Muse v. *Arlington Hotel Co.*, 168 U.S. 430.

LOUIS D. BRANDEIS,
WILLIAM H. DUNBAR,
Counsel for Appellees.

No. 94.

Br. of Brandeis for Appellees.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 94.

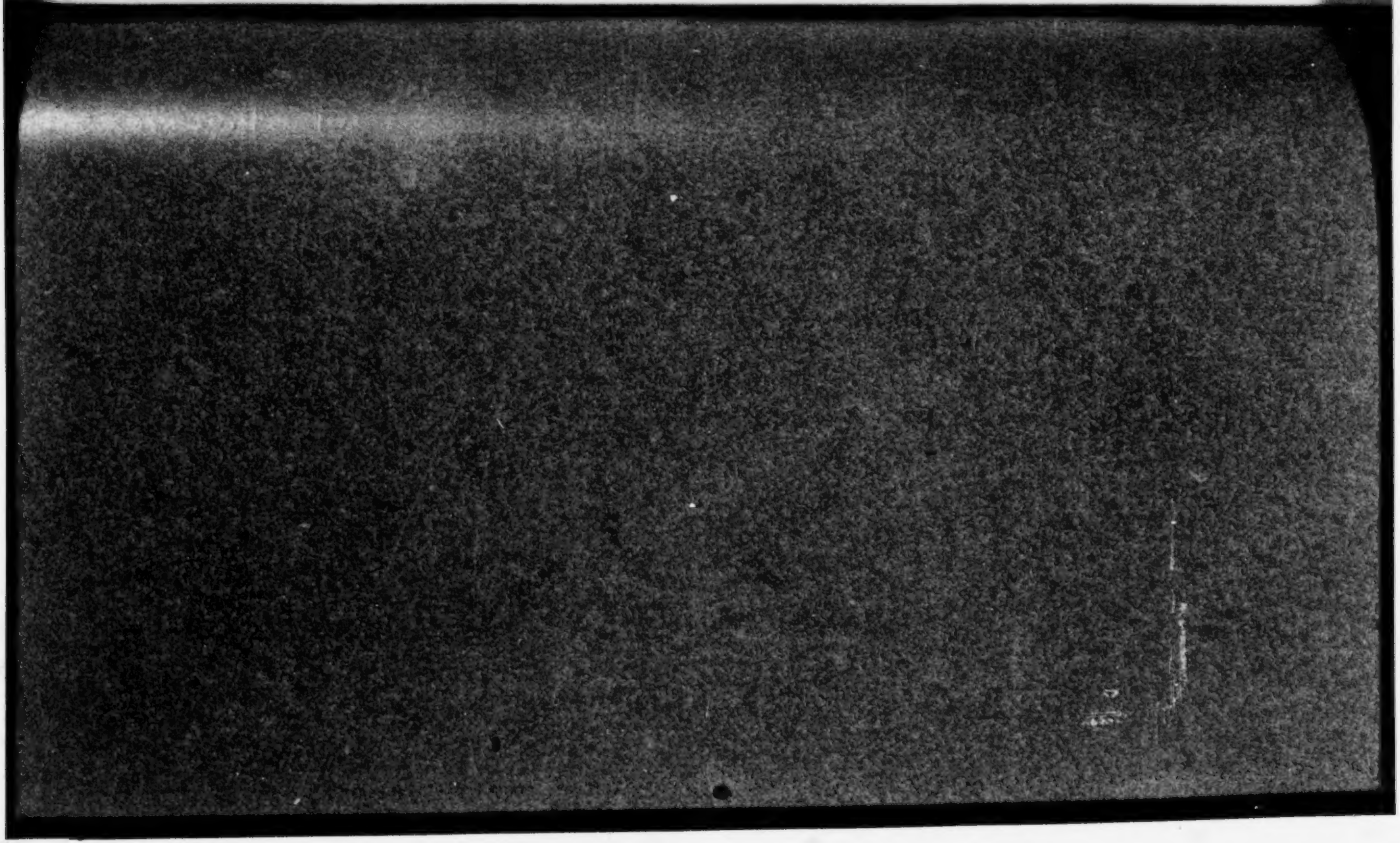
THE HUGULEY MANUFACTURING CO. ET AL.

v.

THE GALETON COTTON MILLS ET AL.

BRIEF IN BEHALF OF APPELLEES IN REPLY TO APPELLANTS' BRIEF IN SUPPORT OF MOTION FOR CERTIORARI.

LOUIS D. BRANDEIS,
WILLIAM H. DUNBAR,
Counsel for Appellees.



Supreme Court of the United States.

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THE GALETON COTTON MILLS ET AL.

BRIEF IN BEHALF OF APPELLEES IN REPLY TO APPELLANTS' BRIEF IN SUPPORT OF MOTION FOR CERTIORARI.

STATEMENT OF FACTS.

This case is a bill in equity filed in the Circuit Court of the United States for the Northern District of Georgia on January 21, 1891. Appeals were taken by the defendants at successive stages to the Circuit Court of Appeals. (See 56 F.R. 690; 72 Fed. R. 708; 94 Fed. R. 269.) The last of these appeals was decided adversely to the appellants on May 16, 1899, and a motion for a rehearing was, on June 1, 1899, denied (Record, p. 102). The appellants thereupon filed a petition in this court for certiorari; this petition was denied October 30, 1899. (See 175 U.S. 726.) On May 12, 1900, the appellants filed a petition for this appeal, and it was allowed by Judge Pardee with serious doubts (Record, p. 103).

The transcript of the record was filed in this court on June 25, 1900, and the printed copies about a year later.

On September 28, 1901, the appellants filed the motion now before the court for a *certiorari* to complete the record. On October 7, 1901, before notice of the motion for *certiorari*, the appellees filed a motion to dismiss the appeal for want of jurisdiction, and a brief in support thereof. Both motions are now before the court.

The transcript of the record in the present case is so defective as to make it impossible to present a statement of facts drawn exclusively from the record of the case. The following statement, based upon such material as the transcript affords, is derived largely from the last opinion rendered in the Circuit Court of Appeals (Record, p. 105).

The Alabama and Georgia Manufacturing Company, a corporation organized under the laws of Georgia (Record, p. 14, statement in petition) on January 1, 1884, executed a mortgage deed of trust to J. J. Robinson and two others to secure $65,000 of bonds. The Huguley Manufacturing Company, also a corporation organized under the laws of Georgia (Record, p. 14), became by purchase the owner of the equity of redemption in this property (Record, p. 105).

The interest due July 1, 1890, on these bonds was not paid, and on the first day of January, 1891, still remained unpaid on $45,000 of the bonds. According to the terms of the mortgage, the default in the payment of this interest, if continued for a period longer than six months, entitled the bondholders to demand payment of the principal, and this privilege was exercised by the holders of the $45,000 of bonds so in default. For this default, the trustee Robinson, on January 21, 1891, filed his bill of complaint against the Alabama and Georgia Manufacturing Company, the Huguley Manufacturing Company, and

William T. Huguley, one of his co-trustees whose interest was adverse to the bondholders, to foreclose the deed of trust. The third trustee was dead. (Record, pp. 55 and 105.)

On this bill a decree of foreclosure was entered and the property sold in September, 1892, to persons representing the bondholders. These purchasers organized the Galeton Cotton Mills corporation, one of the appellees. This corporation entered into possession of the property. On appeal to the Circuit Court of Appeals for the Fifth Circuit the decree under which the sale was had was reversed, and a petition of the Huguley Manufacturing Company for restitution of the property was granted by the Circuit Court on condition that it pay into court $10,000 which had been paid by the purchasers at the sale. This condition was not complied with. The Circuit Court then ordered a new sale of the property. (Record, pp. 55 *et seq.* and 105.) From the decrees ordering a new sale and granting restitution only on condition of the payment of $10,000 the defendants appealed to the Circuit Court of Appeals, which on March 10, 1896, affirmed the action of the Circuit Court. (Record, p. 6.)

The defendants, after the reversal of the first decree for a sale, filed a petition (not included in the transcript of the record) asking that the purchaser who had been in possession under that decree since the time of the first sale be required to account for the rents and profits. On March 10, 1896, an amendment to this petition was filed (Record, p. 14) and on March 16, 1896, the petition was referred to a special master to take the accounts. On May 1, 1896, the defendants filed a petition (Record, p. 16) asking that the sale ordered in the decree of March

30, 1895, be postponed until the accounting for rents and profits was completed. This petition was denied on May 2, 1896 (Record, p. 19). Thereupon the property was sold at auction on May 5, 1896, and purchased by one L. Lanier "representing a majority of the bondholders." (Record, p. 19). This sale was confirmed on June 25, 1896 (Record, p. 24).

On November 2, 1897, the special master to whom the petition for an accounting of rents and profits had been referred filed his report (Record, p. 25) in which he found the Galeton Cotton Mills liable for rents and profits amounting to $39,713.51, including a sum of $2,500 and $891.04 interest thereon for property, not covered by the mortgage, which had been converted by the Galeton Cotton Mills. Both parties filed exceptions to the master's report. Those of the present appellants (Record, p. 40) were directed chiefly to findings of fact. On February 23, 1898, the exceptions of the appellants were overruled, and the exceptions of the appellees were sustained to the extent of reducing the master's finding to $35,857.54, by allowing to the Galeton Cotton Mills a sum of $3,502.52 paid for insurance on the property and $353.45 interest thereon (Record, p. 46), and a decree was accordingly entered on February 28, 1898 (Record, p. 53).

On April 11, 1898, upon a motion of the appellees (not included in the transcript of the record) the Circuit Court entered a decree directing that the rents and profits should be applied in reduction of the mortgage debt (Record, p. 55).

On April 16, 1898, the appellants moved that the rents and profits found due from the Galeton Cotton Mills should be applied to the reduction of the mortgage in-

debtedness at a date intermediate between the two sales. On April 26 a decree was entered denying this motion (Record, p. 63).

On June 4, 1898, the Circuit Court entered a decree fixing the amount of the mortgage debt and the costs, and directing the manner of applying thereto the rents and profits, and the amount of cash already received, and reserving all questions of costs and expenses not therein disposed of (Record, p. 64).

On September 22, 1898, the purchaser at the second sale, Mr. L. Lanier, filed a petition asking that a deed be made to him and that the conveyance be made free from any lien, and especially from any lien for the sum of $2,500 and interest thereon awarded to the Huguley Manufacturing Company in the report of the special master (Record, p. 67).

On October 15, 1898, the Court entered a decree upon this petition directing payment in cash into court of the balanec of the purchase price remaining after allowing the petitioner for the $5,000 deposited by him at the time of the sale, and for $10,000 with interest thereon for the amount paid by him at the first sale of the property. This balance amounted to $48,433.36 with interest at seven per cent. from the time of the second sale. The Court further ordered that all claims of the Huguley Manufacturing Company upon the mortgaged property should be transferred to the net proceeds of the sale (Record, p. 72).

A motion to set aside the decree of October 15, 1898, was made (Record, p. 75) and overruled on November 12, 1898 (Record, p. 77). Thereupon the appellants filed a petition for an appeal to the Circuit Court of Appeals, and this petition was duly allowed on Dec. 2, 1898 (Record,

p. 78). On this appeal the appellants assigned fifty-six errors (Record, p. 79) directed chiefly to the findings of fact of the special master, questions of evidence arising at the hearings before him, and other questions of law in relation to the accounting for rents and profits.

In the Circuit Court of Appeals, on May 16, 1899, the decree of the Circuit Court was affirmed (Record, p. 98). The appellants at once filed a motion for a rehearing, which on June 1, 1899, was denied (Record, p. 102). The appellants thereupon petitioned this court for a writ of *certiorari* to review the decision of the Circuit Court of Appeals. On October 30, 1899, this petition was denied. On May 12, 1900, the appellants presented a petition for appeal to Judge Pardee, which was allowed by him in order to save any rights they might have, but with serious doubts as to the right to an appeal.

In support of their motion for a *certiorari*, the appellants have filed a brief in which they contend :

(1) That the case is within the appellate jurisdiction of this court, or, if not, that this court has authority to and will review the record upon the appellants' suggestions of serious errors appearing therein, and that the appellees' motion to dismiss for want of jurisdiction should not be granted.

(2) That the record shows grave errors committed by the courts below in the course of the proceedings, as well as want of original jurisdiction in the Circuit Court and lack of jurisdiction to grant the relief sought and embodied in the decrees appealed from.

(3) That there is sufficient reason for now granting a *certiorari* to correct the defects in the transcript of the record filed in this court.

The appellees submit that none of these positions are well founded.

ARGUMENT.

I.

The appeal should be dismissed for want of jurisdiction.

1. This court cannot now review the proceedings of the court below unless an appeal lay.

The appellants contend that this court has a general power to supervise all proceedings of inferior courts, and for this purpose to examine and correct errors in the records from such inferior courts, whenever and however such records are brought before it, and such errors called to its attention, and the appellants appear to suggest that any act of Congress limiting the cases in which the decisions of inferior courts may be reviewed by this court upon appeal are infractions of the powers conferred upon this court by the Constitution.

The appellate jurisdiction of this court is defined by statute. Congress has full power to fix the limits of such jurisdiction and to determine the cases in which the decisions of inferior courts shall not be reviewed on error or appeal by this court. Statutes thus defining and limiting the appellate jurisdiction have existed since the foundation of the court and are constitutional.

Am. Cons. Co. v. *Jacksonville T. & K. W. Ry. Co.*, 148 U.S. 372, 378.

"From *Wiscart* v. *D'Auchy*, 3 Dall. 321, to *American*

Construction Co., Jacksonville, etc., Railway Co., 148 U.S. 372, it has been held in an interrupted series of decisions that this court exercises appellate jurisdiction only in accordance with the acts of Congress upon that subject."

Colorado Central Mining Co. v. *Turck*, 150, U.S. 138, 141.

No attempt has been made by Congress, however, in the act creating the Circuit Court of Appeals, to deprive this court of the power to review any case that it sees fit. Under that statute it is expressly provided in cases in which the right to a writ of error or an appeal to this court is not given that this court may review by *certiorari* the proceedings of the courts below, independently of any certificate from the court below.

Act of March 3, 1891, Chap. 517, Sect. 6. 26 Stat. 826.

In the present case, assuming, as the appellees contend, that an appeal did not lie, this court still had power to review the proceedings if it deemed the case one in which such a review was necessary or desirable. A petition for *certiorari* to secure such a review was in fact filed, but was denied by this court October 30, 1899.

Huguley Manufacturing Co. v. *Galeton Cotton Mills*, 175 U.S. 726.

No such application is now before the court. The appellants' motion filed on September 28, 1901, is a petition for a *certiorari* to complete the record, founded on the suggestion of a diminution of the record. If this petition could in any sense be deemed a proceeding to secure a

review by this court on *certiorari*, even if the denial of the former application were not conclusive, the present application would be too late. By analogy to the limitation of time for claiming an appeal such an application must be made within one year from the final decree which it is sought to review.

The Conqueror, 166 U.S. 110, 114.

Aside from the provisions for review by certiorari contained in the statute creating the Court of Appeals, this court will not grant a writ of *certiorari* for the purpose of bringing up for review the proceedings of an inferior court.

Am. Const. Co. v. *Jacksonville T. & K. W. Ry.*, 148 U.S. 372, 380.

The appellants' contention is in its essence that there exists in this court a roving power to review matters not within its ordinary appellate jurisdiction, which this court will exercise on any suggestion of error committed by an inferior court. But such power, so far as any in fact exists, arises only under the provisions of law authorizing this court and other courts of the United States to issue such writs and processes as may be required. (Rev. Stat., Sect. 716.) This power will certainly not be exercised in cases otherwise provided for, and *a fortiori* not where an application has already been made to this court for an extraordinary remedy and has failed. The power is intended to meet emergencies not otherwise provided for, such as proceedings for contempt, in which there is no right to a writ of error or an appeal. The

power is an exercise of the original jurisdiction of the court upon a petition duly filed by leave of court upon which an order to show cause is issued and served.

See *In re Chetwood*, 165 U.S. 443, 444.

If under any circumstances the appellants in the present case could invoke the exercise of such a power by the court, they have not in fact done so. No original petition for the issue of such a writ has been filed, no order of notice has been issued, and by no process of this court have the appellees been brought before it. The petition or motion actually filed is founded on the theory that there is before this court an appeal properly taken and within the court's appellate jurisdiction. This petition cannot be converted into an application to the court for relief under its original jurisdiction.

Unless, therefore, the court is satisfied that the present case is within its appellate jurisdiction, as defined by Statute of March 3, 1891, the appeal must be dismissed.

2. The case is not within the appellate jurisdiction of this court.

The act of March 3, 1891, Chap. 517, creating the Circuit Court of Appeals, provides that decrees of the Circuit Court of Appeals shall be final in all cases in which the original jurisdiction of the Circuit Court was dependent wholly on diversity of citizenship, except such cases as may be brought up upon certificate from the Circuit Court of Appeals or upon a writ of *certiorari* issued by this court. The appellants have sought in various ways to avoid the effect of this provision. They

appear to contend (Appellants' brief, p. 52) that such a limitation on the appellate jurisdiction of this court is unconstitutional, forgetting the provision giving this court full authority to bring any case before it by *certiorari*, and to impugn the validity of the statute on the ground that it is an infringement of the prerogatives of this court. We agree entirely with the appellants' assertion that no case can be put in which the jurisdiction of this court is dependent upon the will of the court below, but it is not a necessary consequence that the appellate jurisdiction of this court is to be exercised independently of any fixed rules, and certainly where the court is given an unrestricted power to bring up cases for review there is no ground for criticising the action of the Legislature.

Again, the appellants seem to contend (Brief, p. 53) that because, as they allege, the decree appealed from was not a final decree, therefore the decision of the Circuit Court of Appeals is not final, and an appeal lies to this court. There appears here to be an obvious confusion of thought. Whether or not the decree was a final decree in the sense of terminating the cause is for the present purposes immaterial. Appeals can be taken only from final decrees of the Circuit Court of Appeals. The decree appealed from cannot be final so as to be the subject of appeal, and yet not final in the sense that the decision of the Circuit Court of Appeals is not subject to review if the case is within the provisions of the Act above referred to. The appellants' contention amounts, in fact, to saying that an appeal can be taken to this court from the Circuit Court of Appeals on an interlocutory decree, although a final decree in the Circuit Court of Appeals in the same case could not be so reviewed.

But the appellants concede at a later point in their argument (Appellants' brief, p. 77) that in the present case no appeal lies to this court, and the decision of the court below was conclusive, if the original jurisdiction of the Circuit Court was dependent exclusively on diversity of citizenship, and this is the undoubted result of the authorities cited by the appellants, and by us in our brief filed in support of the appellees' motion to dismiss.

The appellants contend, however, that the jurisdiction of the Circuit Court was not dependent in the present case exclusively on diversity of citizenship :

(*a*) Because the question of the existence of jurisdiction in equity was necessarily involved. (Appellants' brief, pp. 51 and 52.)

(*b*) Because the land to be sold was outside the jurisdiction of the court. (Appellants' brief, pp. 77 *et seq.*)

(*c*) Because the Circuit Court had no jurisdiction of the cause.

It is certainly not true that a different rule prevails at law and in equity for testing the existence of original jurisdiction in the Circuit Court. In determining such jurisdiction the sole question is whether the court has jurisdiction as a federal court. A federal court never has jurisdiction merely on the ground that the plaintiff is entitled to relief in equity. Hence jurisdiction in the federal courts can never be dependent, in the only sense now material, on the existence of equity jurisdiction. The jurisdiction of those courts is determined by whether the case contains one of the grounds fixed by the Constitution and laws of the United States for the jurisdiction of its courts. The distinction has been clearly pointed out

in this court between jurisdiction in the Circuit Court as a federal court and jurisdiction in the Circuit Court as a court of equity, — with the corollary that the former only is material in determining the right of appeal and similar questions.

Blythe v. *Hinckley*, 173 U.S. 501.
Huntington v. *Laidley*, 176 U.S. 668.

It is equally clear that the original jurisdiction of the Circuit Court, in the only sense material in applying the provisions of the statute, was not dependent on whether the relief asked was such as the court could grant. The Circuit Court of the United States as a federal court can neither acquire nor be deprived of jurisdiction of a cause by the fact that the plaintiff therein is or is not entitled to the relief which he has asked, or that such relief is of a kind that the court can or can not grant. The appellants concede that the ground of jurisdiction must appear on the face of the record at the time the suit is instituted (Appellants' brief, p. 77). They have not suggested the existence of any foundation for jurisdiction other than diversity of citizenship. The prayer of the plaintiff that the court decree a sale of land situated in Alabama is no more claiming a right under the laws of the United States than to ask the court to decree a sale of land in Georgia. Whether or not the court could decree such a sale no more involved a question arising under the laws of the United States than whether or not it could decree a sale of land in Georgia. The power of the court to grant the relief asked is involved in every case; but that is not a matter which can give original jurisdiction to the Circuit Court. If the defendant denies the power of the

court a case may arise under the laws of the United States so as to warrant a direct appeal to this court, but that does not make it a basis of original jurisdiction.

The grounds, and the only grounds, of original jurisdiction in the Circuit Court are set forth in the Act of Aug. 13, 1888, Chap. 866 (25 Stat. 433). Nowhere in that Act is it made a ground of jurisdiction that the relief sought, if granted, will affect property outside the jurisdiction of the court, or that a question may arise as to the judicial power of the court to grant the relief sought. Unless upon the face of the original bill one of the other grounds of jurisdiction enumerated in the statute appeared as a part of the plaintiff's case, there could have been no jurisdiction except for diversity of citizenship.

The appellants' contention that a question of the jurisdiction in the Circuit Court arises which will support the appeal to this court appears to be wholly without foundation. It is immaterial, for the present purpose, whether jurisdiction existed in the Circuit Court or not. The only question now before this court is whether the case brought before it is one of which it can take cognizance under the the statute defining its appellate jurisdiction. The act expressly provides that the question of the existence or not of original jurisdiction in the Circuit Court may be taken direct from the Circuit Court to this court by an appeal upon that question alone. The appellants did not follow that course, preferring to take their case to the Circuit Court of Appeals. They cannot now appeal to this court on the ground of jurisdiction.

McLish v. *Roff*, 141 U.S. 661.

Unless the present appeal is properly before this court,

it must be dismissed without considering the merits of the case, or whether the Court below erred by exceeding its jurisdiction, or otherwise. The appellants' position is really a request for this court to pass on the merits of the case when the case is not one within its appellate jurisdiction.

II.

The appellants show no ground on the merits of the case calling for the interposition of this court.

In support of their motion for a certiorari the appellants rely on alleged gross errors committed by the Circuit Court and the Circuit Court of Appeals. In support of this charge they aver :

(1) That the foreclosure was for the benefit of 90 bonds only out of 130, and that the holders of the remaining 40 bonds were excluded from its benefits.

(2) That the holders of the 40 bonds referred to were necessary parties to the suit.

(3) That the court erred in that the Circuit Court for the Northern District of Georgia ordered the sale of land in Alabama.

(4) That the Circuit Court disobeyed the mandate from the Circuit Court of Appeals made upon a former appeal in the case. (Appellants' brief, pp. 44 *et seq.*)

None of these allegations are well founded.

1. None of the bonds secured by the mortgage were excluded from the benefit of the decree.

The appellants allege (Brief, p. 92) that " Forty of the bonds, aggregating $20,000 in amount, secured by the

mortgage in this case were excluded from benefits by the decrees in the case that were secured to the others." It appears from the decree of foreclosure entered March 30, 1895 (Record, pp. 6 *et seq.*) that prior to the institution of the suit default was made in the payment of interest on 90 out of the 130 bonds secured by the mortgage, and that such default had continued for more than six months, giving these bondholders a right, of which they availed themselves, to declare the principal of their bonds payable. The court thereupon ordered that unless the mortgagor should pay the amount so in default within thirty days there should be a sale of the property.

Obviously any bondholder upon whose bond a default was made was entitled to have the security of the mortgage enforced for his benefit. Upon a default by which $45,000 out of the entire principal of $65,000 had become due with interest, the holders of these matured bonds were entitled to have immediate steps taken to compel the mortgagor to make good the default, or else to have satisfaction out of the security. Clearly they were not compelled to wait until default had been made on all the bonds and all had become due.

The appropriate method of enforcing the security was by proceedings for foreclosure, and the trustees of the mortgage were obviously bound, for the protection of these bondholders, to take proceedings to foreclose. On any other view, the continued payment of interest on a single bond, thus preventing the entire mortgage debt from becoming immediately payable, would deprive the holders of all the other bonds of any remedy under the mortgage.

The decree of March 30, 1895, directing a foreclosure

by sale if the default was not made good within thirty days, fully recognized the rights of those bondholders whose indebtedness had not matured. It provided in Section 11 (Record, p. 11) that in case of sale the proceeds should be brought into court, and the bonds which had not matured at the time of the filing of the bill "are hereby entitled to share in the proceeds of said sale on distribution in amounts according to the findings of the special master, with all accruing interest, and the holders and owners of said bonds may present them with coupons attached for their proper pro rata share of said proceeds according to their tenor and effect."

Under the provisions of the decree just quoted, no bondholder could, except by his own act, be debarred from receiving his proportionate share of the common security, whether the indebtedness on his bond had matured or not.

No departure from this rule was made at any time throughout the proceedings. The appellants have not in their brief undertaken to make any specification of their charge that the so-called minority bondholders were not given the full benefits of the sale equally with the majority. They appear to rely (Brief, p. 97) on the fact that when the sale was finally confirmed on June 4, 1898, the amount of rents and profits for which the appellees were chargeable was ordered to be applied directly in reduction of the mortgage indebtedness, and it seems to be thought that this operated as a discrimination in favor of such of the bondholders as might have been interested in the first purchase of the property under which possession was held for the period during which the rents and profits in question were charged. Obviously, however, the purchaser at the second sale could not properly be required,

as a part of his purchase, to pay this sum of rents and profits into court in cash in addition to the balance of the purchase price of $66.000 for which the property was sold to him. And even if the amount of the rents and profits should have been applied wholly upon that part of the mortgage indebtedness represented by the majority bondholders who were interested in the first purchase, no injury was done to the minority bondholders, since the sum of $43,433.36 cash which was paid into court was in excess of the amount chargeable for rents and profits, so that upon the distribution of this sum the minority bondholders could fully protect their rights.

2. None of the bondholders were necessary parties to the suit.

It has been repeatedly laid down in the decisions of this court that the holders of bonds secured by a mortgage given to a trustee are not individually necessary parties to proceedings to foreclose the mortgage or other proceedings relating to the trust property, although cases may arise in which it is proper to admit individual bondholders, or representatives of classes of bondholders, as parties.

Kerrison v. *Stewart*, 93 U.S. 155.
Richter v. *Jerome*, 123 U.S. 233.
Beals v. *Illinois, Missouri, & Texas R.R. Co.*, 133 U.S. 290.

If in such a case a portion of the beneficiaries are aggrieved by the action of the trustee, they would undoubt-

edly, upon a proper representation to the court, be permitted to intervene in the suit.

Toler v. *E. Tenn. V. & G. Ry.*, 67 F.R. 168.

And if in such a case there is diversity of interest or opinion among the bondholders, it is proper to allow such an intervention.

Farmers' Loan & Tr. Co. v. *Cape Fear & Y. V. Ry. Co.*, 71 F. R. 38.

The remedy of bondholders who have not intervened, however, if they deem themselves aggrieved by the action of the trustee, is by an independent suit asking relief against such action.

In *Richter* v. *Jerome*, 123 U.S. 233, a minority of bondholders secured by a trust deed complained that the mortgage had been foreclosed in the interest of the majority bondholders who had conspired to secure the property for their own benefit at a depressed price. This Court said: "If the decree or the sale under it was in fraud of the rights of the bondholders, their remedy is by a direct proceeding to set aside the sale or the decree and to proceed anew with another foreclosure of the mortgage, and not undertake to reforeclose what had been fully foreclosed before under a decree which remains in force." 123 U.S. 247.

In the present case it does not appear, and is not suggested in the appellants' brief, that any bondholder has ever sought to intervene in the proceedings. It does not even appear that there is any bondholder now dissatisfied with the course of the litigation. Certainly the appellants

representing only the interests of the mortgagor are not interested in the rights of the bondholders among themselves, and cannot impeach the decree on the ground that it does injustice to certain creditors who are unquestionably bound by the decree as against the appellants, and have not themselves seen fit to intervene.

3. The Circuit Court for the Northern District of Georgia had jurisdiction to sell that part of the property situated in Alabama.

It is the settled law of this court that a mortgage given to a trustee to secure bonds covering property situated in different States can be foreclosed as to the whole in a Circuit Court sitting in one of the States, if that court has jurisdiction of all the parties interested.

Muller v. *Dows*, 94 U.S. 444.

The decision in the case just cited has never been doubted, and has repeatedly been acted upon, in cases involving properties of great magnitude situated in numerous different jurisdictions.

In the present case all the parties interested were within the jurisdiction of the court, and were brought before it by its process. The original mortgagor, the Alabama and Georgia Manufacturing Company, and the owner for the time being of the equity of redemption, the Huguley Manufacturing Company, as well as all the surviving trustees of the mortgage, were parties to the proceedings. It was, therefore, under the decision of this Court above cited, within the jurisdiction of the Circuit Court for the Northern District of Georgia, to direct the sale by its

special commissioner of all the property covered by the mortgage.

The appellants in their brief have failed to refer to the decision of this court in *Muller* v. *Dows*. The numerous cases which they have cited relating to sales on execution and similar judicial sales have no application to a case like the present. Courts of law have not the power vested in courts of equity to act *in personam*. Unless the sheriff or marshal to whom an execution is delivered can take the property physically, he cannot under his writ sell it. But a court which by its order can compel whatever conveyances are required to perfect the title can enforce its decree even outside of its territorial jurisdiction.

4. The Circuit Court did not disobey the mandate of the Circuit Court of Appeals.

It is difficult to understand either the meaning or the scope of this objection raised by the appellants. The only mandate of the Circuit Court of Appeals to which they appear to refer, and the only one in the printed record, is that rendered on March 10, 1896, which merely affirmed the decree of the Circuit Court entered on March 30, 1895. Such affirmance gave no added sanctity to the form of the decree from which the appeal had been taken. The subsequent proceedings of the Court under that decree were as much within its power as if no appeal had been taken. If the Circuit Court had desired to modify that decree, it would have had the same right to do so as if no appeal had been taken.

There was not in fact, however, any departure from

the terms of the decree of March 30, 1895, in the subsequent proceedings of the court, nor any inconsistency between that decree and those subsequently entered.

The decree of March 30, 1895 (Record, p. 6), ordered a sale of the property covered by the mortgage in default of the payment within thirty days of the matured debt. The decree provided that in case the holders of any of the bonds should purchase at the sale, they should "be entitled" to pay in bonds, but the decree did not require payment in bonds, and reserved the right to make other decrees in reference to entries of credit on the bonds, and other decrees in conformity to the general scope of that decree. This decree was affirmed by the Circuit Court of Appeals. Subsequently to such affirmance, the property was, on May 6, 1896, sold under the decree (Record, p. 19), and this sale was on June 25, 1896 (Record, p. 24), confirmed by the court. The decree of confirmation provided nothing as to the manner of payment.

On February 23, 1898, a decree was entered (Record, p. 46) disposing of exceptions to the report of the master to whom had been referred the question of accounting for rents and profits for the period between the first and second sales of the property. On April 11, 1898 (Record, p. 55), a decree was entered dealing with the application of the appellants that their costs and counsel fees be made a first charge against the rents and profits. On April 26, 1898 (Record, p. 63), the court entered a decree determining how the rents and profits should be applied to the mortgage indebtedness. This decree affirmed the master's report, from which on this point no exception had been taken by the appellants (see Appellants' Exceptions, Record, p. 40). On June 4, 1898 (Record, p. 64), a

further decree was entered directing the method of application of the rents and profits.

None of the decrees referred to related to any matter which was before the Circuit Court of Appeals or had even arisen at the time the mandate above referred to, rendered on March 10, 1896, was sent down. In none of these decrees, therefore, could the Circuit Court be deemed guilty of having disobeyed the mandate.

On October 15, 1898, the court entered a decree for a conveyance to the purchaser. In this decree the court directed that payment be made in cash by the purchaser of the entire balance of his bid, after allowing the amounts already paid into court on the first and second sales. This decree was certainly in no way inconsistent with the decree of March 30, 1895, under which the sale was made. The decree for sale had not attempted to make any exact provision as to the final payment of the purchase money, or to adjust any rights that might exist in respect thereto.

The other provisions of the decree of October 15, 1898, relating to the payment of costs and expenses from the fund in court were clearly within the reservation of Clause 12 of the decree of March 30, 1895 (Record, p. 11).

Perhaps the most satisfactory answer to this objection of the appellants is that the present appeal is taken from a decree of the Circuit Court of Appeals, affirming that action of the Circuit Court, which constituted, according to the appellants, a disobedience of the earlier mandate from the Circuit Court of Appeals. Indeed, the fact that this objection appears to have been taken for the first time in this court is itself enough to defeat it and to show its factitious character.

5. The appellants have shown no injustice resulting from the action of the court below.

The argument filed in behalf of the appellants contains repeated charges of fraud and judicial misconduct in the course of this litigation. These charges are entirely reckless, and unsupported either in fact or in law. The form in which they are made renders it necessary to deal with them separately and at some length.

(*a*) On page 7 of the appellants' brief, Section IV., it is said: "These statements of findings could not have relieved the Appellate Court from its duty of showing by the record, the pleadings, proceedings, and facts in the cause upon which its judgment is based." It is difficult to attach any definite meaning to this statement. It is sufficiently clear that no duty rested upon the Circuit Court of Appeals to show by the record either the pleadings, proceedings, or facts in the cause. The duty of that court was limited to considering the record presented to it and rendering a decree thereon accompanied by such opinion as the member of the court to whom the duty of writing an opinion might be allotted should prepare with the approval of his associates. Neither the decree of the court nor the opinion of the court is required to do more than state its decision and the reasons leading it to that decision.

(*b*) On page 8 of the appellants' brief, they complain that on the appeal to the Circuit Court of Appeals the record of the case in the Circuit Court was not certified to the Circuit Court of Appeals. The appeal in question was taken by the appellants themselves, and it was their duty to see that a proper record was filed in the Circuit

Court of Appeals. They cannot now complain of any injury resulting from their omission to fulfil this duty. In point of fact, however, it appears that the record of all the proceedings in the cause prior to the last appeal to the Circuit Court of Appeals had been duly certified to that court either in the last appeal or in prior appeals in the same case. (Record, p. 5.)

(*c*) The appellants complain on pages 8 and 9 of their brief of the action of the plaintiff Robinson in instituting this suit. They say that it appears as a necessary inference that he as trustee pretended to represent the holders of all of the mortgage bonds, and they appear to assume that unless he acted at the instance of all the bondholders his action was unauthorized. This suggestion is clearly without any foundation. It is the duty of a trustee under a mortgage securing a series of bonds to act for the protection of any of the bondholders as to whom a default has been made. It was not necessary in the original suit that the trustee Robinson should represent, in the sense of acting at the instance of, all the bondholders, and no ground appears for inferring that he "pretended" so to do.

(*d*) The appellants on page 9 of their brief assert that because $20,000 of the bonds secured were not due when the suit was begun, the bill should necessarily have been dismissed unless amended so as to bring in these bondholders as parties. This contention seems to arise from a misconception of the elementary principles governing the relation of the trustee in a mortgage to the several holders of bonds secured thereby. It is, as we have elsewhere shown, the unvarying rule that the individual bondholders are not necessary parties even if the trustee is

acting contrary to their wishes. If they make complaint of his conduct they may on application be admitted as parties. In the present instance there was, so far as appears, absolutely no diversity of interest between the bondholders whose debt had matured through the default and those whose debt had not matured. No attempt was at any time made or suggested to deprive the bondholders whose debt was still unmatured of their proportionate share in the security. Until such an attempt was made, their interests were not threatened, and they might well be content, as they in fact appear to have been, to permit the litigation to proceed without any intervention on their part. Even assuming the correctness of the appellants' contention as to the necessity of making such bondholders parties, the conclusion which they seek to draw that failure to do so raises a question of federal jurisdiction, is unfounded. Failure to join a necessary party would afford a ground of defence for want of parties, but would not raise any question of jurisdiction of the court as a federal court. This plain distinction has already been considered.

(*e*) On page 14 of their brief the appellants charge with great apparent earnestness that the decree of the Circuit Court of March 30, 1895, under which the property was sold, shows on its face a want of jurisdiction, in that it disposed of the rights and securities belonging to the holders of $20,000 of bonds who were "excluded" from any hearing in the cause, and that it undertook to foreclose by sale land situated in Alabama. It is untrue that the holders of any of the bonds were excluded from a hearing in the cause or were not afforded an opportunity to prove their claims. So far as appears, no individual bondholder has at any time sought to be heard, and as by

the decree appealed from the entire fund in court after the payment of certain preferred liens, costs, and expenses is held subject to further order, it is clear that as yet, at least, no bondholder has been deprived of the opportunity to prove his claim. The power of the court to sell land in Alabama has already been fully discussed.

(*f*) The appellants allege on pages 18 and 20 of their brief that the foreclosure sale was improperly made, in that favors were shown to the Galeton Cotton Mills such that no other person could or would buy the property. In support of this alleged discrimination, no fact is alleged. The only respect in which there was any discrimination between bidders at the sale was the provision in clause ninth of the decree (Record, p. 10) that the successful bidder should pay down $10,000, but that if such bidder represented a majority of the bondholders he need pay down only $5,000. The propriety of this distinction is obvious when it is considered that the bondholders were themselves the persons interested in the purchase money. Certainly allowing a representative of the bondholders to pay a smaller deposit than was required of a stranger could not have the effect of preventing strangers from bidding upon the property, if the deposit required of them was reasonable, and no suggestion has been made that a deposit of $10,000 would under the circumstances be so unreasonable as to deter intending purchasers.

(*g*) On pages 19 and 22 and elsewhere in their brief, the appellants have much to say as to the supposed deception practised upon the court in leading it to suppose that the purchaser of the property represented all the bondholders. It does not in fact appear that any such deception was practised or any such representation made. In

support of this charge, the appellants refer to statements in opinions rendered in the Circuit Court and the Circuit Court of Appeals, and to the statement in a petition by the purchaser for confirmation, in which he declared that he was "ready to surrender the bonds of said company in payment of the balance of the purchase money on confirmation of the sale, all of the bonds being legally or equitably the property of your petitioner and his associates and under their control" (Record, p. 20). The inference is drawn (Appellants' brief, p. 36) that this statement was necessarily false, because two and one-half years later it appeared that the petitioner was no longer able to deposit all the bonds. Such an inference is unwarranted.

(*h*) The appellants insist strenuously (although it is not apparent what possible interest these appellants can have in the question) that the proceedings under the decree of sale were unfair, in that the rents and profits for which the Galeton Cotton Mills, the purchaser at the first sale, was found liable, were applied to the payment of the mortgage indebtedness, and, as the appellants charge, thus "swept into the pockets" of the bondholders who owned the Galeton Cotton Mills to the alleged detriment of other bondholders (Appellants' brief, p. 26). This clearly is a matter concerning only the relations between the individual bondholders whose bonds were secured by the mortgage, and does not in any way affect the interests of the mortgagor whose equity was foreclosed by the sale. In point of fact, however, the record shows no ground for criticising this action, or any fact indicating a discrimination against the holders of bonds who were not interested in the Galeton Cotton Mills Company, since by the decree complained of — that of April 11, 1898

(Record, p. 55)—no attempt was made to adjust the relations between the several bondholders.

(*i*) The appellants charge (Brief, p. 29) that there was a violation of the decree of March 30, 1895, because the Circuit Court, when it finally confirmed the sale and directed a conveyance to the purchaser, by its decree of October 15, 1898 (Record, p. 72), directed that the entire balance of the purchase money, after certain deductions, should be paid in cash instead of in bonds. The decree of March 30, 1895, however, provided (Section 10, Record, p. 11) only that the purchaser, if the holder of bonds, should be entitled on confirmation to pay the balance in bonds. Clearly it is no ground of complaint on the part of the appellants, if the purchaser does not object, that the latter was deprived of this privilege. In any event, whether payment was made in one way or in the other, was utterly immaterial to these appellants, who represented the foreclosed equity. That such an objection should be taken with apparent seriousness shows the desperate straits to which the appellants are reduced in their efforts to show errors committed by the courts below.

(*j*) The appellants charge (Brief, p. 33) that an error of $10,087.18 was committed by the court in its decree of June 4, 1898, in computing the amount of interest due on the mortgage debt (Printed record, p. 64). Without going into any computation of what the interest should actually be, it is sufficient to refer to the appellants' own computation of interest (Record, p. 62) made in connection with their application that the rents and profits be applied at an average date earlier than the date of the second sale. This computation shows items of interest on the mortgage debt, although reduced by such inter-

mediate application of the rents and profits, amounting to over $26,000 as against the sum of $20,624.83 alleged in their brief to be the amount properly due. This error of the appellants is probably in part at least accounted for by their omission to observe that the amount of interest stated in the decree of March 30, 1895, was there expressly stated as interest due up to November 1, 1894, only (Section 6, Record, p. 10).

(*k*) The appellants allege (Brief, p. 34) that the sum of $3,391.04 which was found due from the Galeton Cotton Mills to the Huguley Manufacturing Company for property not covered by the mortgage was twice deducted from the amount of rents and profits allowed against the Galeton Cotton Mills. In support of this they refer to the decrees of February 28, 1898 (Record, p. 53), and of June 4, 1898 (Record, p. 64). It appears from an inspection of these decrees that on February 28, 1898, in passing upon the special master's report, the court deducted from the amount which he had allowed against the Galeton Cotton Mills an item of $3,502.52 principal and $353.45 interest for insurance paid by the Galeton Cotton Mills not allowed them by the Master. This reduced the rents and profits for which they were found accountable to $35,857.54, the sum stated by the appellants as that resulting from deducting the sum of $3,391.04, which they assert was twice deducted. In the decree of June 4, 1898 (Record, p. 64), the court did in fact deduct the sum of $3,391.04 from the amount of rents and profits found chargeable to the Galeton Cotton Mills, which was to be credited on the mortgage indebtedness, leaving the amount of such credit $32,466.50. These two deductions which the appellants refer to as of the same amount were

therefore of entirely distinct sums, each standing on its own basis, and each properly deducted.

One radical vice pervades almost the entire argument submitted by the appellants. They seek to inject into a controversy between the mortgagor who has been foreclosed and the mortgagees questions which relate solely to the relations *inter se* of the holders of bonds secured by the mortgage. It in no way affects the rights of these appellants whether a part of the bondholders have been unfairly treated or not. We have endeavored to show above that the record contains nothing to justify the aspersions cast alike upon the trustee, the bondholders who united in the organization of the Galeton Cotton Mills, the judge of the Circuit Court before whom the case has been pending for nearly ten years, and the judges of the Circuit Court of Appeals to whom these appellants have three times taken appeals. But it seems proper to protest against the discussion of questions which relate exclusively to the rights of persons who are not before the court, are not necessary parties to the cause which is before the court, and have not deemed it essential to the protection of their interests to ask to be admitted as parties in order that they might be heard. It is wholly consistent with the record that every holder of bonds secured by the mortgage in question is perfectly satisfied with the proceedings of the trustee and of the court. At every stage in the proceedings, the court has reserved the power to determine the rights of the several bondholders in the distribution of a fund which represents on any theory more than half the proceeds of the fore-

closure. If those rights have been determined, it must certainly be assumed that the bondholders who have stood by without asking leave to intervene do not feel themselves aggrieved, and if those rights have not yet been determined, there is no reason to assume that in their determination the rights of any of the bondholders will be disregarded. The interests of the appellants are certainly inconsistent with the interests of any of the bondholders. So far as appears, the only appellant not interested solely as original mortgagor or owner of the equity of redemption is a trustee who did not at the time the decree for sale was made own any of the bonds (Record, pp. 7 *et seq.*), and had refused to join in enforcing the security upon default being made.

The charge freely made in the appellants' brief (see pages 9, 10, 31, 39, 96) that the foreclosure was part of a scheme unjustly to secure the mortgaged property for the benefit of the Galeton Cotton Mills is not supported by any evidence, while it is clear that this protracted and expensive litigation has resulted wholly from the acts of the debtors in default, who have sought to retain the mortgaged property for their own benefit, and have endeavored by the magnitude of their claims to make up for the smallness of the foundation upon which they are based.

III.

The appellants have shown no ground for granting a certiorari to complete the record.

We agree fully with all that is said in the appellants' brief as to the fatally defective nature of the transcript of record filed in this court, but before granting the appell-

ants' motion for a writ of *certiorari* to complete that transcript, the court should be satisfied that some advantage will be gained by such a course, and that there is some sufficient reason for the delay in making the application.

We have already endeavored to show that on the appellants' own statement, the only effect of completing the record will be that the appeal must be dismissed for want of jurisdiction. If the omitted parts of the record are not such, and it is plain from the appellants' statement that this is the fact, as to bring the case within the appellate jurisdiction of this court, the granting of the writ will be entirely futile, and this court will not exercise its discretion for such a purpose.

There can be no question of the validity of the decree of the Circuit Court of Appeals from which the present appeal was taken. The clerical mistake of the clerk in marking certain papers with the docket number "789" and others with the docket number "798" is not substantial, since the identity of the causes is established by the clerk's certificate that all of the papers are comprised in the record of the case in which the appeal is taken. The Circuit Court of Appeals had full authority to act on such a record as it and the parties before it deemed sufficient. The difficulty into which the appellants have fallen is that they neglected to have the transcript of the record sent from the Circuit Court of Appeals to this court completed. In the lower court the record was complete by reference to other papers which were themselves a part of the records of that court, having been brought there on earlier appeals in the same cause. In this court the papers constituting the records

on these former appeals were equally necessary, but were not made a part of the transcript. The defects in the record, therefore, cannot on any theory affect the decree from which the appeal was taken, and no action of this court is necessary to make that decree valid.

The appellants have offered no explanation of their delay in applying for this writ of *certiorari*. A most cursory inspection of the record would have sufficed to show its incompleteness, yet after the appellants filed the transcript on June 25, 1900, no step was taken to complete it until this motion was filed, on September 28, 1901, a lapse of fifteen months and the passage of an entire term of court.

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